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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte GREGORY JOHN CHARLES STOKES
And STEVEN JOHN ANTHONY BARICS

Appeal 2011-013108
Application 12/051,056
Technology Center 1700

Before EDWARD C. KIMLIN, TERRY J. OWENS, and
BEVERLY A. FRANKLIN, *Administrative Patent Judges*.

KIMLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1-16. We have jurisdiction under 35 U.S.C. § 6(b). Claim 1 is illustrative:

1. A filled two-piece aluminum can containing a wine that has less than 35 ppm of free SO₂, less than 300 ppm of chlorides and less than 800 ppm of sulfates, the can being sealed with an aluminum closure such that the [sic] there is a pressure within the can sufficient to prevent buckling of the can and wherein the inner surface of the aluminum can is coated with a corrosion resistant coating.

The Examiner relies upon the following references as evidence of obviousness:

Miyazaki et al. (Miyazaki) JP 62-014777 Jan. 23, 1987

Ferrarini et al., "Packaging of Wine in Aluminum Cans," *Oenology Dept. of C.R.V.E. Grape and Wine Research Centre, Bologna University*, No. 5, pp. 59-64 (1992).

Kojima et al., "Corrosion of Aluminum in White Wine," *Corrosion Engineering* 45, pp. 357-371 (1996).

Leske et al., "The composition of Australian grape juice: chloride, sodium and sulfate ions," *Australian Journal of Grape and Wine Research* 3, pp. 26-30 (Apr. 1997).

Appellants' claimed invention is directed to an aluminum can containing wine having the recited amounts of SO₂, chlorides and sulfates. Appellants assert that the claimed invention solves the long-standing stability problem for canned wine.

Appealed claims 1-16 stand provisionally rejected on the grounds of nonstatutory obviousness-type double patenting over claims 1-16 of co-pending application US Serial No. 11/863,823. The appealed claims also stand rejected under 35 U.S.C. § 103(a) as follows:

- (a) claims 1-4, 8-12, 15, and 16 over Ferrarini in view of Kojima,
- (b) claims 6, 7, 13, and 14 over the stated combination of references further in view of Leske,
- (c) claim 5 over the stated combination of references further in view of Miyazaki.

Appellants do not present separate arguments for any particular claim on appeal. Also, Appellants have not challenged the obviousness-type double patenting rejection or presented separate, substantive arguments against the § 103 rejections of claims 5-7, 13, and 14. Accordingly, all the appealed claims stand or fall together with claim 1, and we will, perforce, affirm the Examiner's obviousness-type double patenting rejection.

We have thoroughly reviewed each of Appellants' arguments for patentability, as well as the declaration evidence relied upon in support thereof. However, we are in complete agreement with the Examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of §103 in view of the applied prior art. Accordingly, we will sustain the Examiner's rejections for essentially those reasons expressed in the Answer, and we add the following primarily for emphasis.

There is no dispute that Ferrarini, like Appellants, discloses packaging wine in a two-piece aluminum can wherein the wine has a free SO₂ concentration within the claimed range, namely, 4 ppm. As acknowledged by the Examiner, Ferrarini does not specify the concentrations of chlorides and sulfates in the canned wine, but Table 1 of the reference, which lists the composition of the white wine used in various tests, does not list any chlorides or sulfates. Hence, it is reasonable to conclude that the canned wine of Ferrarini contains less than 300 ppm of chlorides and less than 800 ppm of sulfates, as presently claimed.

Furthermore, Kojima, who tested the corrosive effect of white wine on aluminum, discloses that the commercial white wine used has a free SO₂

concentration of 18 ppm, a sulfates concentration of 700 ppm, and a chlorides concentration of 24.6 ppm, values well within the claimed ranges. Hence, Kojima buttresses the reasonableness of the conclusion that the canned wine of Ferrarini comprises the claimed concentrations of free SO₂, sulfates and chlorides found in commercial wine.

Moreover, we agree with the Examiner that the cited prior art establishes a strong case of obviousness for the claimed wine in an aluminum can. To the extent it is Appellants' position that the claimed concentrations of free SO₂, sulfates and chlorides result in stable shelf life for the wine, it reasonably follows that the commercial wines reported in the cited prior art would also exhibit the same stability. In addition, inasmuch as both Ferrarini and Kojima evidence that it was known in the art that the presence of free SO₂, chlorides and sulfates have a corrosive effect on aluminum, it would have required no more than routine experimentation to determine the optimum levels of the ions to inhibit such corrosion. Such routine experimentation has long been held to be a matter of obviousness for one of ordinary skill in the art.

Appellants rely upon the declaration of Stokes, one of the present inventors, as evidence of the fulfillment of a long-felt need by the claimed invention, and commercial success. We have thoroughly reviewed the declaration but we agree with the Examiner that Appellants have failed to establish the requisite nexus between the composition of wines within the scope of the appealed claims and the reported commercial success. As pointed out by the Examiner, Appellants have proffered no comparative side-by-side data for wines having compositions within and outside of the

scope of the appealed claims. Indeed, as acknowledged by Appellants, Kojima teaches the use of a commercial wine within the scope of the appealed claims. Nor, as set forth by the Examiner at pages 11-13 of the Answer, have Appellants established that factors other than the recited composition of the claimed wine were not responsible for the commercial success, such as, for example, the actual quality or grade of the wine, the marketing and advertising strategy employed, any increase in the capacity of the production facilities, or other factors, such as licensing agreements. Also, as noted by the Examiner, the gross sales figures in the declaration do not reflect a growth in the market share of the product.

In conclusion, based on the foregoing and the reasons well stated by the Examiner, it is our judgment that the Examiner properly concluded that the evidence of obviousness outweighs Appellants' evidence of nonobviousness. Accordingly the Examiner's decision rejecting the appealed claims is affirmed.

The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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